No. 06-576

In the Supreme Court of the United States

JES PROPERTIES, INC.
d/b/a CYPRESS TRAILS FARM,
a Florida corporation, and
MICHAEL W. GALLAGHER,

Plaintiffs,

vs.

USA EQUESTRIAN TRUST, INC., f/k/a USA EQUESTRIAN, INC. (formerly the American Horse Show Association), UNITED STATES EQUESTRIAN FEDERATION, INC., DAVE BURTON a/k/a DAVE BURTON, SR. a/k/a DAVE E. BURTON a/k/a DAVID E. BURTON, SR., BURTONS AND SONS, INC., DAVID BURTON a/k/a DAVID BURTON ,JR., a/k/a DAVID E. BURTON a/k/a DAVID E. BURTON, JR., LITTLEWOOD FENCES, INC., LTD., KERNAN HODGES a/k/a MRS. EUGENE R. MISCHE, STADIUM JUMPING, INC., THOMAS E. STRUZZIERI, HORSE SHOWS IN THE SUN, INC., LINDA S. ALDRICH, AND FOX LEA FARM, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ROBIN S. TRUPP
ARNSTEIN & LEHR LLP
1100 North Florida Avenue
Tampa, Florida 33606
(813) 254-1400

ARTHUR L. KLEIN
Counsel of Record
ROBERT D. BUTTERS
JOHN C. ROPIEQUET
JASON B. HIRSH
ARNSTEIN & LEHR LLP
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100

Midwest Law Printing Company/Photex — Chicago — (312) 431-0185

This Reply Brief is submitted pursuant to Supreme Court Rule 15(6) in reply to the Opposition Briefs of Respondents United States Equestrian Federation Inc ("USEF") and Thomas G. Struzzieri and Horse Shows In The Sun, Inc. ("Respondents")[1], and in support of Petitioners' Petition for Writ of Certiorari. With all due respect, Respondents' Opposition Briefs contain significant misstatements and omissions, which necessitate this Reply.

First, Petitioners believe it important to note that this Court granted the Petition For Writ of Certiorari in *Credit Suisse First Boston Ltd. v. Billing*, No. 05-1157 ("*Billing*"), on December 7, 2006. Respondents omit this significant fact, which is especially important because the Eleventh Circuit expressly refused to follow *Billing* when it granted antitrust immunity to the USEF Mileage Rule at issue here. 458 F.3d at 1233.

Of equal importance, while they accuse Petitioners of misstating the Eleventh Circuit's opinion, Respondents in fact themselves incorrectly describe it. Petitioners submit that the Eleventh Circuit's opinion cannot possibly be read to stand for any proposition other than granting a blanket antitrust exemption for the Mileage Rule, without analysis of the Rule or whether it is necessary to make the Amateur Sports Act ("ASA") work.

In marked contrast to the Second Circuit's approach to implied antitrust immunity in *Billing*, which follows the prior decisions of this Court, the Eleventh Circuit cited only *Behagen v. Amateur Basketball Ass'n of the United States*, 884 F.2d 524 (10th Cir. 1989), *cert. denied*, 495 U.S. 918 (1990), and *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198 (5th Cir. 2000), as authority for the proposition that any rule adopted by a National Governing

---

[1] None of the other Respondents has filed an Opposition Brief.

Body ("NGB") under the ASA which purports to deal with a general subject matter the NGB is authorized to regulate has blanket antitrust immunity, without having to analyze the rule to determine whether it is reasonable and necessary to effectuate congressional intent as embodied in the ASA. 458 F.3d at 1231-33.

Neither *Behagen* nor *Eleven Line* so holds. To the contrary, both cases specifically and carefully analyzed the rules involved. The Eleventh Circuit's misdirected reliance on the term "monolithic control" used in *Behagen* does not support its conclusion that all actions of an NGB are exempt from the antitrust laws. Rather, that language was used by the *Behagen* court to explain that, under the rule at issue there (defining who was eligible to be an amateur basketball player) the NGB and only the NGB had the power to determine player eligibility. That unshared power was what made its control "monolithic." *Behagen* does not suggest, as the Eleventh Circuit evidently believed, that every rule promulgated by an NGB under the ASA is automatically exempt from antitrust scrutiny, particularly where, as here, the NGB has shared or even outright delegated the scheduling power to for-profit private parties like the Promoter Respondents.

Respondents also appear to suggest that this Court's opinion in *Gordon v. New York Stock Exchange Inc.*, 422 U.S. 659, 95 S.Ct. 2598 (1975), supports the proposition that there may be blanket antitrust immunity for the ASA's regulatory scheme, without reference to or analysis of the specific rule at issue. But *Gordon* says no such thing. Restating the well settled proposition that repeal of the antitrust laws by implication is not favored and must not be casually allowed, *Gordon* held that the NYSE system of fixed commission rates operating under the active supervision of the SEC was entitled to antitrust exemption because imposition of antitrust liability against such positive SEC actions would unduly interfere with the operation of the

Securities and Exchange Act. *Gordon* carefully noted and explained the specific statutory provision that granted exclusive authority over commission rates to the SEC, as well as the extensive legislative history and congressional conduct confirming Congress' intent to cede control of commission rates to the SEC alone. 422 U.S. at 662, 682-86.

Here, to the contrary, as USEF concedes (USEF Br., p. 21), no court, let alone this Court, has ever held or even suggested that the ASA impliedly repealed another statute. It does not. Accordingly, as the Second Circuit held in *Billing* and as the courts also held in *Behagen* and *Eleven Line*, it is necessary to examine and analyze the Mileage Rule to determine its reasonability and whether it is necessary to make the ASA work.

Furthermore, while the question is not directly before this Court at this juncture, strong arguments exist for holding that the Mileage Rule is not reasonable and not necessary to make the ASA work. If "monolithic control" by an NGB is the correct standard, the Mileage Rule is the antithesis of "monolithic control." Both the district court and the Eleventh Circuit "blessed" the Mileage Rule, without examination, simply because it dealt with "scheduling," one of the areas in which the NGBs like USEF have at least subject matter jurisdiction. But until the Rule was amended effective in 2006, encompassing a lengthy time period during which Petitioners claim substantial damages, the Mileage Rule placed all scheduling decisions for A-Rated Shows in the crucial Florida Winter Season, which the district court accepted as the Relevant Market, (Rule 214.7; R. 317-14/8-9/18; R. 317-18/5/21; A. 24) not in the hands of the NGB, but rather solely in those of a small cartel of private for-profit promoters. The USEF had virtually nothing to say in this regard. This small group of incumbent promoters could and did grant each other waivers while excluding non-members of the cartel like the

Petitioners from the Relevant Market, at their choice alone.[2]

While Respondents point to the 2006 Amendments to the Mileage Rule, only an incumbent promoter has the power to initially approve a waiver request even under those Amendments. Thus, under the Amended Mileage Rule provides that if the incumbent promoter declines to grant a waiver to allow a competing promoter to hold an A-Rated Show, USEF cannot override that decision since one of the prerequisites for USEF to grant a sanction for the competing show will not be met.[3] At the very least, there is a substantial question whether the Amended Mileage Rule, enacted long after this litigation was commenced, continues to grant the private Promoter Respondents, rather than USEF, ultimate control over scheduling.

Similarly, and while also not directly relevant at this juncture, USEF's Brief contains a dissertation extolling the alleged benefits of the Mileage Rule, including supposed protection of horses and riders and the assurance that the "best would compete against the best." (USEF Br., p. 10) But substantial evidence was presented to the district court contesting these allegations, including evidence that the

---

[2] Moreover, waivers, when granted, would permit competing horse shows on the same dates as close as 10 miles apart, not 250 miles, as the Mileage Rate preliminarily fixes.

[3] The Amended Mileage Rule provides, in pertinent part: "with USEF prior approval, the mileage restrictions set forth [above] . . . will not prevent two Hunter/Jumper competitions from being approved if the two competitions have different competition managements, the mileage distance between competitions is at least 10 miles *and the competition with priority gives written permission.*" (USEF Am. Rule 214.7, emphasis supplied) (A.36; USEF Br. At 7; Struzz. Br. 2-3)

lack of competition imposed by the Mileage Rule leads to overcrowding and abuse of the horses and hyper-expensive prices and costs. (R. 317-1/8; 317-4/2 Ex. R; R.335) Respondents also concede that at least until 2006, even under their interpretation of the Mileage Rule, competitions could be held 10—not 250—miles apart on the same dates, at the sole discretion of the incumbent private promoters, completely eliminating any supposed benefit that a mandatory 250-mile separation would confer on horses, riders or the quality of the competition. (USEF Br., p. 6)[4]

Again, while relevant primarily to the veracity of Respondents' position, Petitioners note that USEF has taken substantial liberties, not only with its description of the Eleventh Circuit's opinion and this Court's ruling in *Gordon*, but also with other cases it cites in support of its position. Thus, for example, it cites *Lee v. United States Taekwondo Union*, 331 F. Supp. 2d 1252 (D. Hawaii 2004), for the proposition that the "ASA governed at points of conflict with the Civil Rights Act, 42 U.S.C. § 1981, and that deference to NGB decisions also precludes discrimination claims or remedies therefor that would conflict with sport governance." (USEF Br., p. 28) However, *Lee* in fact holds precisely to the contrary: the court there held that the ASA did not preclude a coach from bringing a race discrimination claim under section 1981.

---

[4] USEF's Brief quibbles about whether it was conceded that the Mileage Rule has anti-competitive effects. (USEF Br., p. 17) The fact of the matter is, as stated in the Petition, the contention was never denied below and the district court so assumed in its analysis. (A.46)

CONCLUSION

The Eleventh Circuit unequivocally refused to follow *Billing*, a case in which this Court has granted Certiorari, creating a split in the circuits on the important issue of whether and under what circumstances antitrust immunity will be implied. Thus, it stated: "Regardless of whether *Billing* would require a more searching scrutiny of the Mileage Rule, this Court follows the more closely analogous holdings in *Behagen* and *Eleven Line*." 458 F.3d at 1233. But neither *Behagen* nor *Eleven Line* supports its conclusion that there should be blanket implied immunity from the antitrust laws for all rules promulgated by an NGB, without examination or analysis of the rule's effects and without determining whether the rule is necessary to effectuate congressional intent embodied in the statute, merely because the rule may be within a general category of rules the statute permits the NGB to adopt. The Eleventh Circuit's ruling clearly conflicts not only with *Billing*, now before this Court on Certiorari, but also with *Gordon* and with this Court's seminal decisions in *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1242 (1943), and *United States v. Nat'l Ass'n of Securities Dealers*, 422 U.S. 694, 95 S.Ct. 2427 (1975).

For the reasons set forth in Petitioners' Petition for Writ of Certiorari and those set forth in this Reply Brief, Petitioners respectfully pray that this Court issue a Writ of Certiorari and thereafter reverse the judgment of Eleventh Circuit.

Respectfully submitted,

ROBIN S. TRUPP
ARNSTEIN & LEHR LLP
1100 North Florida Avenue
Tampa, Florida 33606
(813) 254-1400

ARTHUR L. KLEIN
Counsel of Record
ROBERT D. BUTTERS
JOHN C. ROPIEQUET
JASON B. HIRSH
ARNSTEIN & LEHR LLP
120 South Riverside Plaza
Suite 1200
Chicago, Illinois 60606
(312) 876-7100